Supreme Court, U.S.
FILED
JAN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-881

In The
Supreme Court of the United States
October Term, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and DANIEL J. SHANNON,

Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a multi-employer pension fund possesses an implied right, not expressed by contract or statute, to reject collectively bargained pension agreements reached in compliance with federal labor law and negotiated between an employer and the exclusive bargaining representative of bargaining unit employees and pension plan beneficiaries.

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STATEMENT OF THE CASE

1. Record Facts

For many years prior to the filing of the Complaint giving rise to this proceeding, Kraftco, Inc.[1] and Local 327 of the International Brotherhood of Teamsters Union had engaged in collective bargaining. In the course of numer-

[1]Respondent filed with the Court of Appeals a certificate indicating that Kraftco, Inc. (the corporate predecessor of Kraft, Inc.) is a wholly owned subsidiary of Dart & Kraft, Inc. At the end of November 1986, Kraft, Inc. merged into Dart & Kraft, Inc. and is now known as Kraft, Inc., a publicly traded corporation.

ous negotiations of renewal labor agreements, the parties collectively bargained for the terms and conditions of employment for employees within the three bargaining units at issue in this proceeding. The labor relationship between Kraftco and Local 327 has been amiable and peaceful. At trial, current Local 327 business agent Billy Burrows testified that Kraftco has always been "a very fair company" which honors agreements reached with the Union. (Tr., pp. 163, 164).[2]

In 1966 Kraftco and Local 327 reached an agreement with regard to pension entitlement for bargaining unit employees which is not under attack in this proceeding. In that year the parties agreed to defer pension contributions for employees until they acquired thirty-six months of seniority within the bargaining unit. (Petition Appendix, p. 85). It is undisputed that there was no change in the parties' contribution practices from 1966 until 1978.

The thirty-six month deferral practice which began in 1966 was designed to accommodate the substantial employee turnover in the affected bargaining units. (Petition Appendix, p. 104). The deferred contribution practice allowed for a higher wage level than would have been possible if monthly pension contributions were paid on behalf of short-term employees who never expected to realize retirement income. The Fund does not now and has never

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[2]The Pension Fund noted in its Petition for *Certiorari* at footnote 2 that Local 327 is not seeking review of the consolidated Court of Appeals Judgment which is the subject of the Fund's Petition. Accordingly, the Sixth Circuit's declaration of rights and responsibilities in the companion case between Kraftco and Local 327 has not been made the subject of a timely petition for *certiorari* filed with the Court.

alleged that the thirty-six month deferral practice was illegal under any contractural or statutory provision in effect in 1966.

In 1969, the collective bargaining agreements were subject to renewal negotiations. Although an International Teamster representative indicated his displeasure with the thirty-six month deferral practice, the Local Union president and the bargaining committee clearly were content to maintain the arrangement as part of their labor agreement. The thirty-six month deferral practice was continued in effect between the parties by a letter agreement executed on June 27, 1969, by the parties' authorized representatives. (Petition Appendix, p. 98).

The manner in which labor agreements were negotiated by the parties and their contents communicated to bargaining unit members is instructive. At union ratification meetings, bargaining unit employees were apprised only of *changes* in the collective bargaining agreement that had been negotiated between the parties. (Tr., p. 163). The written contract did not exist at the time of a ratification vote and employees were told verbally by their union representative of negotiated modifications. (Tr., p. 148, 163). Accordingly, where there was no change in the terms which existed in a prior collective bargaining agreement, the work force was informed of no modification. The thirty-six month deferral practice which began in 1966 continued unabated until 1978.

The parties' open discussion of the continuation of the deferral practice through the course of the 1969 negotiations has been amply attested. In the 1969 negotiating sessions, with the Local 327 bargaining committee present, the president of Local 327 agreed to work out contract

language and provide the company with a letter agreement which would continue the thirty-six month contribution practice. (Tr., p. 101, 105, 106, 134, 135). There was no evidence to the contrary. Although the parties did not discuss revision of the deferral practice in later renewal negotiations, the union's bargaining committee discussed the effect of the deferral practice and clearly was aware of its impact in 1972 and 1975. (Tr., p. 135-139).[3] The unrefuted evidence also establishes that the parties intended the thirty-six month deferral practice to continue indefinitely, or until the parties modified their agreement as to each of the three bargaining units covered by the relationship between Kraftco and Local 327. (Petition Appendix, p. 68).

Nowhere in the collective bargaining agreements, letter agreement or pension plan documents (Supplemental Appendix 3) have the parties to the labor agreement conferred upon the Fund a right to reject the negotiated pension agreement. Nowhere do any of the foregoing documents confer upon Kraftco an obligation to produce copies of all relevant documents and collective bargaining agreements to the Fund except upon express request by the Fund. The Fund has neither contended nor established that Kraftco ever refused to provide any documents requested by the Fund or an explanation of Kraftco's contribution practices during the entire twelve year duration of the thirty-six month contribution practice.

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[3]As to bargaining unit knowledge and ratification of the thirty-six month deferral practice, the "sole evidence on this issue" was the testimony of James Dreaden. His testimony was never refuted by the testimony of any witness for the Fund. (Petition Appendix, p. 63).

The letter agreement specifically provided for "discussion and adjustment" in the event any employee was adversely affected by the thirty-six month contribution practice. The stated purpose of this language was to protect any employee who may have had pension entitlement adversely affected by the deferral practice. (Tr., pp. 104, 105). The sole evidence adduced concerning the impact of the deferral practice reveals that only two employees have been affected by the practice. In 1979 Kraftco tendered payment to the Fund pursuant to its agreement with Local 327 on behalf of an employee apparently affected by the thirty-six month contribution agreement. (Tr., pp. 32, 33, 106, 107; Supplemental Appendix 1, p. 2a). However, the Fund returned Kraftco's tender "consistent with the litigation posture" of the Fund. (Supplemental Appendix 1, p. 3a). The employee was not deprived of retirement benefits.

The second employee affected by the deferral practice was identified in 1981. Again, Kraftco tendered pension contributions on behalf of that employee pursuant to its agreement with Local 327. (Tr., pp. 107, 108; Supplemental Appendix 2, p. 6a). On this occasion, the Fund accepted Kraftco's tender and assessed interest on the contributions occasioned by their delinquency, which also was paid by Kraftco. Supplemental Appendix 2, pp. 8a-11a).

The evidence clearly reveals that no employee has been denied pension benefits as a result of the deferral practice. Furthermore, the Fund's actuarial integrity was explicitly protected by Kraftco's tender of sums on behalf of any employee whose pension entitlement was affected by the deferral agreement. There was no proof that any employee was harmed by the deferral practice. There has been no proof that Kraftco refused to make any employee whole

pursuant to the letter agreement or tender contributions to the Fund on behalf of any affected employee. There was no showing that Kraftco ever failed to make full disclosure with regard to its contribution practices consistent with its agreement with Local 327.

2. Course of Proceedings Below

In 1978, Central States filed its Complaint against Kraftco under the provisions of 29 U.S.C. §§ 185, 1132 and 1145.[4] Thereafter, Kraftco sought to join Local 327 as a necessary party to the Fund's Complaint, which motion was denied by the district court. Accordingly, in 1979 Kraftco filed its declaratory judgment action against Local 327 pursuant to the provisions of 29 U.S.C. § 185 and 28 U.S.C. §§ 1337, 2201 and 2202. (Petition Appendix p. 40). The trial court then consolidated the two cases for joint disposition.

In late 1979, the parties filed cross motions for summary judgment in the consolidated cases. In 1981, the trial court granted Local 327's motion to dismiss Kraftco's declaratory judgment action. However, the court ruled that the action between the Fund and Kraftco raised factual issues requiring a trial because the "resolution of the central dispute in this action depends upon the intent of Kraftco, Inc. and the Union." 527 F. Supp. 420, 422 (M.D. Tn. 1981). Kraftco appealed and the Court of Appeals reversed the district court's dismissal of Kraftco's Complaint.

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[4]The Complaint also raised assorted state law theories of recovery which the Sixth Circuit disposed of adverse to the Fund's claims. The Fund does not seek review of the dismissal of its state law claims.

683 F.2d 131 (6th Cir. 1982). The Court of Appeals noted the anomalous nature of the trial court's dismissal of a party to the contract where the "central issue in dispute" between Kraftco and the Fund involved the contractual intent of Kraftco and Local 327. This contractual intent could not be resolved simply by referring to the collective bargaining agreements. There was a patent ambiguity in the language of the collective bargaining agreements. Accordingly, the Fund was not clearly entitled to the remedies it sought and its summary judgment motion was denied.

After a trial held on March 15, 1982, the court's judgment entered on May 9, 1984, in favor of the Fund. 589 F. Supp. 1061. The trial court found for the Fund on the basis of asserted trust fund rights derived from the common law of the State of Illinois. Further, the court invalidated the letter agreement as a result of a Section 302(c) (29 U.S.C. § 186) analysis which was accepted by neither the panel decision of the Sixth Circuit (Petition, Appendix B) nor the *en banc* Opinion of the Court of Appeals. 799 F.2d 1098. The only appellate support for the Fund's Section 302(c) arguments was contained in Judge Jones' *per curiam* affirmance in the panel Opinion which was later abandoned by Judge Jones in the *en banc* deliberations concerning the Section 302 issue. Accordingly, a unanimous Court of Appeals has concluded that the trial court's reliance on state law and Section 302 provides no legal basis for the Fund's cause of action.

The *en banc* Court of Appeals for the Sixth Circuit, consisting of thirteen circuit judges, found nothing in the facts or the law which invalidated the agreement negotiated by Kraftco and Local 327. The court concluded that

the Fund suffered no injury and that Kraftco had committed no illegality under this nation's federal labor and pension laws. The *en banc* court held that the letter agreement of June 27, 1969, served to detail the agreement actually and lawfully reached between Kraftco and Local 327 concerning Kraftco's obligations to contribute to the Fund on behalf of bargaining unit employees. The "overwhelming evidence" is that the letter agreement was neither secret nor an illegal attempt to circumvent Kraftco's contribution obligations. (Petition Appendix, p. 68).

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SUMMARY OF ARGUMENT

The Fund's Petition for a Writ of *Certiorari* should be denied primarily because the Fund's claimed injury is speculative rather than real. The concerns addressed by the Fund's argument are theoretical and not premised in the facts of this case.

Additionally, review should be denied because the Court of Appeal's unanimous *en banc* decision is clearly consistent with the federal scheme of collective bargaining and pension entitlements. No provision of Congress or statutory construction by this Court is offended by the judgment on review. To the contrary, the Fund seeks an extension of existing law which is inconsistent with prior decisions of this Court.

Finally, the request for a writ should be denied because the decision subject to review is consistent with the decisions of this Court as well as other Courts of Appeal and no important public policy issue is raised by the facts

of this case which would warrant this Court's exercise of its discretionary jurisdiction.

ARGUMENT

The Fund's request for review seeks to undermine long established principles of federal labor law arising under the Labor Management Relations Act. 29 U.S.C. § 185. These federal labor law principles of exclusive representation constitute the legal predicate upon which ERISA rights are premised, as recognized by ERISA itself. 29 U.S.C. §§ 1132, 1145. Congress clearly intended that pension obligations created through the process of collective bargaining would remain subject to and derivative of rights and responsibilities recognized by federal labor law policies expressed by the enactment of Sections 301 and 302 of the Labor Management Relations Act. (29 U.S.C. §§ 185, 186).

I. Where There Has Been No Injury in Fact, the Fund's Speculative Claims Arising in a Case of "First Impression" Are Not Appropriate for This Court's Discretionary Review.

The Fund properly concedes that this case is "one of first impression." (Petition, p. 5). However, without regard to the facts adduced at trial, the Fund would have this Court perceive that substantial injury will be suffered by the Fund and its beneficiaries unless the Court of Appeal's unanimous *en banc* decision is overturned. Clearly, the Fund's concern is prospective rather than retrospective. The Fund argues that the decision under review in some manner may serve as "an invitation" to employers and unions to enter into illicit agreements, the nature of

which are not evidenced in this dispute. In essence, the Fund seeks an advisory opinion with prospective effect, a practice which this Court does not condone. *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

The 1966 deferral practice which was continued through the 1969 letter agreement has had no proven adverse impact on either the corpus of the Fund or on any identified beneficiary. The following determinative facts cannot be contested by the Fund: the 1966 deferral practice embodied in the parties' collective bargaining agreements was not secret, nor did it seek to reduce Kraftco's responsibilities in any unlawful manner. Because the Fund has never challenged the legal efficacy of the 1966 agreement, all arguments concerning the later effect of that agreement as embodied in the 1969 letter agreement fall of their own weight. It is uncontested that from 1966 until 1978 Kraftco's contribution practice remained unchanged. The thirty-six month contribution deferral was detailed either in the 1966 collective bargaining agreements or the 1969 letter agreement. Accordingly, the Fund's rhetoric concerning "modifications" and "secret agreements" is factually unsupported. From 1966 until 1978, the Fund was never given an opportunity to rely upon a contrary definition of Kraftco's rights and responsibilities to the Fund. The Fund has never asserted and certainly has not proven that upon receipt of a collective bargaining agreement negotiated in 1969, the Fund had reason to conclude that Kraftco's pension contribution responsibility was anything other than that which was contained in the 1966 collective bargaining agreement. There is no proof that throughout twelve years of consistent practice the Fund ever inquired of Kraftco nor is there proof that Kraftco misled the Fund.

Because the 1966 deferral practice has never been challenged by the Fund, Kraftco's consistent compliance with its terms over the course of twelve consecutive years cannot constitute a "modification" or "reduction" of Kraftco's obligations to contribute on behalf of the Fund beneficiaries.

Absent proof that the Fund's actuarial computations *were in fact* premised upon a mistaken view of the content of the 1969 collective bargaining agreement, the Fund cannot argue that its financial integrity has somehow diminished. If the Fund's actuarial assumptions were not impaired by the 1966 deferral practice, they could not have been impaired by twelve years of consistent conduct thereafter by Kraftco and Local 327 absent proven misrepresentation by Kraftco.

Factually, the Fund has not been injured except as a result of its affirmative refusal to accept funds tendered by Kraftco on behalf of a single employee affected by the thirty-six month deferral practice. (Supplemental Appendix 1). Pursuant to the express provisions of the 1969 letter agreement, Kraftco tendered contributions on behalf of Mr. Craft in order to make him whole and accordingly maintain the financial integrity of the Fund. The Fund's response to Kraftco's offer was to award Mr. Craft benefits while returning the amount tendered by Kraftco on Mr. Craft's behalf. The only injury to Fund integrity was by the Fund's deliberate litigation-related decision.

In stark contrast to Mr. Craft's circumstance, when Mr. Fred Howell was identified as having been affected by the deferral practice (Supplemental Appendix 2), the Fund accepted the contributions *and assessed interest* in

order to restore the Fund to the financial posture it would have maintained had there been no deferral practice. Kraftco paid the interest assessed and the Fund has offered no reason to believe that Kraftco would not have paid a similar interest assessment on behalf of Mr. Craft or any other employee affected by the thirty-six month deferral provision.

The Fund makes no showing, other than in conclusory and speculative terms, that its actuarial assumptions with regard to benefits payable to the bargaining unit employees of Kraftco would deviate in any manner from the pension entitlements actually claimed by Kraftco's retiring employees. Although the Fund speculates that "secret side agreements" could under some set of circumstances diminish the Fund's actuarial soundness, this case presents no facts which would support the Fund's contentions. Because Kraftco has paid assessed interest in addition to tendered contributions on behalf of employees for whom the Fund has incurred liability, there is no showing of fact which demonstrates that Fund assets "inure to the benefit of an employer in violation of 29 U.S.C. § 1103(c)(1)." (Petition, p. 24).[5]

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[5]The actual, as opposed to theoretical, actuarial impact on the interests of the Fund is clearly *de minimus*. As the parties to the deferral practice understood in 1966, employee turnover in the three bargaining units affected by the deferral practice was such that relatively few employees would ever be affected. That only two have ever been identified since 1966 confirms the reasonableness of the practice. When assessing the benefit ramifications of the contribution practice, the Union correctly estimated that an allocation of monies into higher wages would not adversely affect pension expectations of bargaining unit members.

Although the Fund argues that Kraftco has incurred an obligation to disclose to the Fund all documents which pertain to its pension agreement with Local 327, no such contractual undertaking by Kraftco has been proven by the Fund. A review of the collective bargaining agreement, the trust agreement and pension plan documents reveals no such contractual responsibility has been assumed by Kraftco. Nor has there been any evidence that the Fund requested pertinent documentation which Kraftco declined to produce. Accordingly, even the Fund's right to request relevant information pursuant to the pension agreement and Section 209 of ERISA (29 U.S.C. § 1059) has not been thwarted in any measure by action or inaction on the part of Kraftco. Again, the purported injury the Fund is seeking to remedy is not present in this case.

In the same manner, no provision of ERISA or any pertinent pension-related contractual commitment of Kraftco provides the Fund with an absolute right to reject contributions the Fund deems to be unsatisfactory. The Fund does not seek to reject the contributions made by Kraftco from 1966 until 1969. Accordingly, there can be no cogent reason why the Fund should be entitled to reject contributions beyond 1969 which were made by Kraftco consistent with the 1966 agreement.

In short, the Fund's Statement of Question Presented deprives the requested review of merit by misstating the facts in this case. There was no "secret agreement." There was no attempt "to reduce the employer's contribution obligations" under its collective bargaining agreements. There was no omission of contributions for "covered employees." Finally, the Fund has no statutory or

contractual right to "reject" a pension agreement lawfully negotiated between Kraftco and the exclusive bargaining representative of Kraftco's employees. Because the Fund has shown no actual injury, it would be inappropriate to grant a petition for *certiorari*. The peculiar historical context in which this case arises strongly militates against any argument that this is an issue which can be expected to arise frequently on a recurring basis. A petition for *certiorari* should not be granted here where the issue, although theoretically important, fails to rise "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).[6]

II. The Sixth Circuit's En Banc Decision Supports and Is Consistent With Federal Labor and ERISA Policy.

The Fund's Complaint, the district court Opinion, and the Judgment of the Court of Appeals sitting *en banc* consistently recognize that the Fund's cause of action is premised in the separate but interrelated provisions of 29 U.S.C. §§ 185, 1132 and 1145. The Fund never has suggested that these statutory rights and remedies are inconsistent in any degree. The Fund would be hard pressed to do so.

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[6]In its Reply Brief filed in *Central States v. Whitworth Bros. Storage Company*, Docket No. 86-481, October Term, 1986, the Fund notes that contentions "on behalf of two specially situated individuals cannot compare in importance" to the congressional scheme protecting employee benefit agreements (p. 5). The anomolous irony is heightened—in *Whitworth* the Fund argued to keep contributions mistakenly paid, while in this case the Fund seeks to obtain contributions never agreed to.

An action brought under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) constitutes a claim for breach of a contract negotiated in the collective bargaining context. The Fund concedes the fundamental fact that, "29 U.S.C. § 1145 creates a statutory cause of action, enforceable by trustees under 29 U.S.C. § 1132(a)(3), if an employer fails to make contributions in accordance with the terms of the collective bargaining agreement." (Petition, pp. 10, 11). Accordingly, the clear congressional touchstone for pension enforcement is the collective bargaining agreement itself.[7]

Actions brought under the provisions of Section 301 of the LMRA are conceptually dependant upon this Court's recognition that Congress intended to create a comprehensive statutory scheme of contract enforcement which would further national labor peace and stability. *Teamsters Local 174 v. Lucas Flour Company*, 369 U.S. 95 (1962). To underscore the Congressional intent to further labor stability, this Court has recognized the principle of exclusive representation embodied in 29 U.S.C. § 159(a). *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). Broad dis-

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[7]As the Fund previously has argued to this Court, "An employer's obligation to contribute to Central States is established in the collective bargaining agreement, which the trustees of the funds have no role in negotiating." Central States' Petition for a Writ of *Certiorari*, *Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, Docket No. 82-2157, October Term 1982 (July 2, 1983). At footnote 2 of the Fund's Petition in *Central Transport, Inc.*, the Fund also recognized, "ERISA has incorporated principles set forth in the LMRA." Further, in its response to the petition for *certiorari* filed in *Prosser's Moving and Storage Company v. Robbins*, Docket Nos. 82-1860 and 82-1862, October Term 1982 (July 6, 1983), the Fund acknowledged that "Fund trustees stand completely outside of the collective bargaining process."

cretion is afforded a collective bargaining representative to permit accommodation of all the competing interests existing within a bargaining unit. Inevitably, differences in employee interest arise which can be accommodated only by providing the statutory bargaining representative with the discretion to effect outcomes in negotiation that may affect separate classes of employees differently. *Ibid.*

The goal of industrial stability is best served by allowing that degree of freedom of contract in collective bargaining which permits the parties to a labor agreement a wide range of latitude without governmental interference as to the specific terms and conditions of employment. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). The congressional policy favoring industrial stability and labor peace through freedom of contract is not served when third parties, private or governmental, seek to control the substantive outcome of collective bargaining.

Enforcement actions brought under Section 301 of the Labor Management Relations Act are measured by federal labor contract law principles. *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957). The contractual principles governing collective bargaining agreement interpretation and enforcement recognize the unique nature of the ebb and flow of industrial relations. Labor contract interpretation cannot be relegated to the subtle niceties of ordinary contract law. The collective bargaining agreement is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The labor agreement is a "living document" not

confined to the four corners of the labor contract. *Porter, supra,* at 108.

Accordingly, welfare benefit rights established through the course of collective bargaining can only be measured by the collective bargaining agreement itself. *Lewis, et al., Trustees v. Benedict Coal Company,* 361 U.S. 459 (1960). It is the contract, "which is the measure of the third party's rights," 361 U.S. at 467. With reference to the collective bargaining representatives' rights and responsibilities in the negotiation of retiree benefits, it is clear that unions may bargain for increased wages in lieu of retiree benefits without violating federal labor laws. *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company,* 404 U.S. 157 (1971). In *Chemical Workers,* this Court also recognized that retirees may rely on the collective bargaining agreement and actions brought under Section 301 to enforce their collectively negotiated pension rights.

ERISA was enacted against this federal labor policy backdrop. In *Nachman Corp. v. Pension Benefit Guarantee Corporation,* 446 U.S. 359 (1980), this Court observed that through ERISA Congress merely insured that a promise to an employee of a specific defined pension benefit at the time of retirement would be received if the employee satisfied the conditions required to obtain the benefit. 446 U.S. at 375. However, this Court has further observed that Congress intended to leave the role of defining the benefit that cannot be forfeited "largely to the private parties creating the plan. That the private parties, not the government, control the level of benefits is clear from the statutory language. . . ." *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 511 (1981).

Because there is no specific benefit level guaranteed by ERISA, the permissibility of side letters negotiated between parties to the collective bargaining agreement is not subject to the regulatory strictures of a statutory scheme such as the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*). See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In *Barrentine*, this Court recognized that in the absence of a specific statutory proscription, unions may "reasonably and in good faith" sacrifice individual interests for the good of the group. 450 U.S. at 742.

Because ERISA defines no specified benefit levels, trustee enforcement actions are limited to the terms of the collective bargaining agreement itself. *NLRB v. Amax Coal Company*, 453 U.S. 322 (1981). Pension plan trustees' rights to enforce collectively bargained contribution obligations are subordinated to the terms of the agreement actually reached through the process of collective bargaining.

> The management appointed and union appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively-bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, 29 U.S.C. § 186(c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer.

453 U.S. at 336. Pension plan trustee rights are derived from and defined by the agreement actually reached between the parties in collective bargaining.

> When neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of the collective bargaining contract.

United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, 576 (1982). Thus, Section 302 of the LMRA intervenes only to assure that collectively bargained employee welfare benefit fund contributions go for the employee purposes intended by the parties. It violates the purpose of Section 302(c) to use it as a means to thwart the legitimate expectations of the parties in collective bargaining.

Neither Section 302(c) nor ERISA serves to prohibit union "discrimination" among classes of employees by which benefit agreements are reached in order to serve the variety of union objectives present in any collective bargaining context.

> Section 302(c)(5) plainly does not impose [a] . . . reasonableness requirement. . . . There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective bargaining agreements because the union need not 'affirmatively . . . represent' [them] or . . . take into account their interests in making *bona fide* economic decisions in behalf of those whom it does represent. [Citing *Chemical Workers, supra.*] Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condi-

> tion that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective bargaining agreement.

Robinson, supra, at 576.

The Fund's argument that Section 302(c) of the LMRA constitutes a prohibition of the letter agreement continuation of the thirty-six month deferral practice does not comport with federal labor and ERISA principles recognized by this Court. The letter agreement was merely a single document among the many which comprised the "living contract" with which Kraftco and Local 327 defined their pension agreement. It was open, well-known and consistent with the literal terms of the prior collective bargaining agreement. Accordingly, to invalidate the letter agreement would destroy the legitimate and lawful expectations of both Kraftco and Local 327 at the time of its execution. Section 302(c) of the LMRA does not call for this result.

As this Court has recognized, Section 515 of ERISA, on which Central States also has sued in this case, is a congressional recognition that the entire breadth of federal labor law has been validated and incorporated into the statutory framework supporting the purposes of ERISA. *Kaiser Steel Corp. v. Mullins, et al.,* 455 U.S. 72 (1982). The Fund would have this Court repeal by implication the vast history underlying the federal labor policies embodied in Section 301 of the LMRA. In *Kaiser Steel,* this Court expressly refused to do so.

In *Schneider Moving and Storage Co. v. Robbins,* 466 U.S. 364 (1984), this Court recognized that where compet-

ing considerations arise under Section 301 of the LMRA as opposed to Section 502 of ERISA, the analytical predicate for judicial deliberation is written evidence of contractual intent. Where the parties have expressed their intent in writing, the courts are to give deference to the bargain struck between the employer and the exclusive bargaining representative. Where the parties have expressly defined the benefit levels with written agreements, there is no room for a contrary outcome through judicial construction. Kraftco and Local 327 clearly defined in the collective bargaining agreements of 1966 and the letter agreement of 1969 that contributions would not be paid on behalf of employees until the employees attained thirty-six months' seniority. The Fund's argument to the contrary does not comport with the clear expression of contractual intent evidenced in this case.

Instead, the Fund asks this Court to imply a statutory responsibility on the part of Kraftco to produce all relevant documents to the Fund before the Fund incurs responsibilities. The Fund also argues for a reciprocal right to reject any agreement of which it does not approve. Neither right is expressed by the contracts or documents from which the Fund derives its authority to sue, and neither right nor responsibility is expressly conferred by statute.[8] This Court has recognized its extreme reluctance

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[8]It should be noted that the Fund has never raised the issues of implied statutory rights and responsibilities prior to its Petition for *Certiorari*. As the Fund has acknowledged in its brief in response to the cross-petition for *certiorari* filed in *Whitworth Bros. Storage Company v. Central States*, Docket No. 86-666, October Term 1986, "This Court ordinarily does not decide questions presented" for the first time in a petition for *certiorari*, citing *Youaquim v. Miller*, 425 U.S. 231, 234 (1976).

to imply statutory remedies not expressly conferred by Congress. *Northwest Airlines, Inc. v. Transport Workers Union of America,* 451 U.S. 77 (1981).[9] *See also, City of Milwaukee v. Illinois,* 451 U.S. 304, 313 (1981); *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134 (1985).

Finally, the position urged by the Fund in this case is patently inconsistent with the position taken by the Fund and the ruling of this Court in *Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559 (1985). In *Central Transport,* the Fund successfully urged this Court to acknowledge that the Fund's need to conduct employer audits was necessitated by the *voluntary* employer self-reporting scheme envisioned by the trust agreements and pension plan documents. In that case, this Court recognized that the same trust documents on which the Fund now relies create a responsibility on the part of participating employers to make payments to the trust fund only "as required by the applicable collective bargaining agreement." The Fund must acknowledge that its rights are subservient to and dependent upon the bargaining agreement actually reached between the employer and the union through the process of labor negotiation.

Similarly, the trust documents confer a contractual right on the part of the trust fund *to request* the production of records and to examine those records in order to properly administer the trust. The right of examination

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[9]Indeed, the Fund extensively relied upon this principle in its petition for writ of *certiorari* filed in *Central States v. Whitworth Bros. Storage Company,* Docket No. 86-666, pp. 7-13.

and the responsibility of production arises only at such time as the trustees request such examination or production. (*See,* Supplemental Appendix 3, Trust Agreement, Article III, Sections 1 and 5). *Central Transport, supra,* 472 U.S. at —, 96 L.Ed.2d at 451.

The plain fact is that despite the provisions of the trust agreement and despite the fact that ERISA came into play in 1975, Central States sat by passively for a time in excess of twelve years and never once made inquiry, or sought to examine the basis on which Kraftco rendered its contributions. Kraftco had a right to rely on the apparent satisfactory state of its pension compliance. Accordingly, affirmance of the Sixth Circuit *en banc* decision (which was thoroughly well reasoned and unanimously adopted) serves the interest of federal labor and pension policy as previously recognized by this Court.

III. The Fund's Petition for Certiorari Raises No Policy Issues of Sufficient Importance to Warrant This Court's Review.

The Fund's extensive reliance upon the protections afforded by Section 302(c) of the LMRA purports to place "various courts of appeals" at odds with the decision reached by the *en banc* Court of Appeals in this matter. However, this circuit authority "to the contrary" merely recognizes what all courts of appeals dealing with the issue have held: Section 302(c)(5) requires a "writing" in order to satisfy the integrity standards imposed on trust funds negotiated in collective bargaining. The cases cited by the Fund proscribe *oral* agreements in oppo-

sition to or in addition to written collective bargaining agreements.[10]

It is disingenuous at best to argue that Section 302(c)(5) has any preclusive effect on the written documents in evidence in this proceeding. The first appeal to the Sixth Circuit (683 F.2d 131) established the law of the case: the collective bargaining agreements of 1969 could not be interpreted solely by resort to the language contained within them. Accordingly, resort to evidence outside the collective bargaining agreement was essential in order to resolve the "central issue in dispute." To now argue that the 1969 collective bargaining agreements did not contain an implicit ambiguity which could be resolved only by reference to the external letter agreement of June 27, 1969, is a patent afront to efficient judicial administration and the preclusive principles established by the rule of the "law of the case." This Court has recognized that appellate courts "generally refuse to reopen what has been decided." *Messenger v. Anderson,* 225 U.S. 436, 444 (1912); *See also,* Vestal, *Law of the Case: Single Suit Preclusion,* 1967 Utah Law Review 1. Because the Court of

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[10]*Lewis v. Seanor Coal Company,* 382 F.2d 437 (3d Cir. 1967), *den. cert.,* 390 U.S. 947 (1968) (oral modification of pension agreement violates Section 302(c)(5)(B) of LMRA); *Moglia v. Geoghegan,* 403 F.2d 110 (2d Cir. 1968), *den. cert.,* 394 U.S. 919 (1969) (trustees justified in refusing to accept contributions pursuant to oral pension agreement); *Manning v. Wiscombe,* 498 F.2d 1311 (10th Cir. 1974) (union acquiescence in employer's contribution practices not in compliance with the collective bargaining agreement not binding on pension fund); *Waggoner v. Dallaire,* 649 F.2d 1362 (9th Cir. 1981) (written pension agreements may not be modified orally by the union and the employer); *Maxwell v. Lucky Construction Company,* 710 F.2d 1395 (9th Cir. 1983) (oral agreement to make pension contributions cannot modify the written collective bargaining agreement).

Appeals for the Sixth Circuit has previously concluded that the parties' intent in negotiating the agreements after 1969 was essential to the resolution of this dispute, the Fund cannot now reopen the fundamental question concerning contractual ambiguity and resort to extra-contract evidence.

The Fund also argues that the Court of Appeals' disposition is at odds with a prior decision of the Eighth Circuit in *Central Hardware Company v. Central States, Southeast and Southwest Areas Pension Fund,* 770 F.2d 106 (8th Cir. 1985), *cert denied,* — U.S. —, 106 S. Ct. 1515 (1986). However, a review of the *Central Hardware* decision reveals that the employer and the union in that case explicitly agreed that their modified pension agreement was subject to review and challenge by the Central States Pension Fund. After negotiating a modification of the pension obligations, a memorandum of understanding was executed by the union and the employer which recognized that the new agreement might violate the terms of the existing pension plan. Although the parties in *Central Hardware* submitted their modification for the approval of the Central States trustees, Kraftco and Local 327 clearly did not so agree.[11] In the absence of written documents evidencing the parties' contractual intent to create trust fund rights and remedies, none should be inferred. *Schneider Moving and Storage, supra.*

Most defective to the Fund's reliance upon the "conflict" between the *en banc* decision and the *Central Hard-*

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[11]Additionally defective to the Fund's arguments premised in *Central Hardware* is the unchallenged fact that the 1969 letter agreement *modified nothing.* It merely continued an agreement first reached in 1966 which the Trust Fund has never challenged.

ware opinion, stands this Court's clearly enunciated policy of denying *certiorari* in the absence of substantial treatment of an issue by various courts of appeals. Even a true conflict (not presented in this case) is insufficient to warrant Supreme Court review where lower federal courts have had an inadequate opportunity to fully develop the procedural and substantive aspects of the issue under consideration. *E.g., Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting).[12]

In the absence of some significant reason to believe the disputed issue in this proceeding shall be a recurring issue, a grant of *certiorari* is inappropriate. Despite the Fund's assertion that plan beneficiaries will be adversely affected, the facts clearly reveal that no employee of Kraftco, no plan beneficiary, nor the Fund itself has been damaged in any real degree by the deferral practice at issue. Purely personal rights do not rise to the level of "public importance" sufficient to warrant Supreme Court review. *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203 (1943).

Similarly, there has been no showing that there are a considerable number of suits involving this issue presently pending in the lower courts which would justify the exercise of this Court's discretionary *certiorari* jurisdiction. *See, Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1964); *Maryland v. United States*, 381 U.S. 41, 43 (1965).

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[12]*See also*, Justice Brennan, Some Thoughts on the Supreme Court's Work Load, 66 Jurisdiction 230, 233 (1983); Stern and Grossman, Supreme Court Procedure, 6th ed., pp. 197-202 (1985); Cole, Petitioning for *Certiorari* in the Big Case, 12 Litigation 3, p. 33ff (Spring, 1986).

The issue for which the Fund seeks review is only abstractly and speculatively presented in the context of this proceeding. The facts in evidence in this case simply do not warrant the concern expressed by the Fund with regard to perceived diminution of its financial integrity or fiduciary responsibility. Clearly, review of the issue the Fund requests to bring to the Court's attention, even if important, should "await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In summation, the speculative and episodic nature of the issues raised by the Fund's Petition are plainly outside the normal scope of discretionary review extended by this Court to cases of significant public importance. A grant of *certiorari* is customarily reserved for cases where a true and substantial conflict among the various courts of appeals reveals a lack of unanimity on the issue. Accordingly, the grant of this Court's discretionary review would serve no overriding purpose other than to vindicate the interests of the individual parties before the Court.

CONCLUSION

Kraftco, Inc. respectfully requests that the Fund's Petition for a Writ of *Certiorari* to the Court of Appeals for the Sixth Circuit be denied and the well-reasoned, unanimous *en banc* opinion remain undisturbed because, (1) the undisputed facts reveal that the Fund has suffered no particularized injury nor has any beneficiary been deprived of pension benefits as a result of the agreement clearly

reached between Local 327 and Kraftco, (2) the court of appeals' *en banc* decision clearly comports with the overriding statutory structure which defines pension benefits derived from the collective bargaining process, and (3) there is no true "conflict" presented in this case and if any conflict in principle exists, insufficient judicial attention has been directed at the issue to provide this Court with the adjudicatory reasoning from the lower courts which typically accompanies cases warranting this Court's discretionary review.

Respectfully submitted,

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(Counsel of Record)
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(615) 320-5200

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1900 Fifth Avenue North
Birmingham, Alabama 38203-2691
(205) 252-9321

Attorneys for Respondent.

No. 86-881 (3)

In The

Supreme Court of the United States

October Term, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and DANIEL J. SHANNON,

Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

LARRY W. BRIDGESMITH
(Counsel of Record)
CONSTANGY, BROOKS & SMITH
1080 Vanderbilt Plaza
2100 West End Avenue
Nashville, Tennessee 37203-5231
(615) 320-5200

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Suite 1015
1900 Fifth Avenue North
Birmingham, Alabama 38203-2691
(205) 252-9321

Attorneys for Respondent.

SUPPLEMENTAL APPENDIX TABLE OF CONTENTS

APPENDIX 1

Defendant's Exhibit 13
Tender Re: George Craft

(logo)
KRAFT
INC

Dairy Group

(Sealtest Foods)

June 7, 1979

Central States, Southeast and
Southwest Areas Pension Fund
8550 W. Bryn Mawr Avenue
Chicago, Ill. 60631

Gentlemen:

By letter dated May 22, 1979, you advised Mr. George Craft, Social Security No. 410-18-7803, a former employee of this company that certain contributions were not made on his behalf. Enclosed herewith please find a check in the amount of $900.00 for contributions covering the employment of Mr. Craft for the period December 30, 1968 through December 31, 1971 as provided by the June 26, 1969 collective bargaining agreement between this company and Local 327 of the Teamsters, Chauffeurs, Helpers, Taxi Cab Drivers Union.

Your cooperation in expediting the crediting of this amount to his pension fund account, and thereafter, the expediting of the processing of his retirement application will be appreciated.

Sincerely yours,

/s/ Royce McClintock

RM/pm

(logo)

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND
PENSION FUNDS

Executive Director
John E. Dwyer

July 27, 1979

Mr. Royce McClintock
Sealtest Foods
Division of National Dairy
Products Corporation
1401 Church Street
Nashville, Tennessee 37203

RE: SEALTEST FOODS — Account #7177000-1204
GEORGE CRAFT — Social Security #410-18-7803

Dear Mr. McClintock:

Please be advised that the situation regarding the above named participant and your correspondence of June 7, 1979 were recently reviewed by the Attorneys' Committee.

After a full discussion a motion was made, seconded and unanimously carried (a) to recommend that Mr. Craft be awarded recognition for his three years of credited service from 1969 to 1971, consistent with the litigation posture of the Pension Fund that there was an employer *obligation* to pay contributions during that period on behalf of Mr. Craft, and that a corresponding decision be reached with respect to the application by Mr. Craft for retirement benefits; (b) to request that similar treatment be afforded to other retired or retiring employees of Sealtest Foods; and (c) to request that our local counsel be instructed that *selective* employer contributions from Sealtest Foods are not acceptable.

In accordance with the action of the Attorneys' Committee, the amount of $900.00 which was submitted by

Sealtest Foods through your office on June 7, 1977 in an attempt to selectively contribute on Mr. Craft's behalf is returned herewith.

July 27, 1979
Mr. Royce McClintock
Page Two

Very truly yours,

/s/ JOSEPH J. BURKE
ASSISTANT COUNSEL

JJB/nwl
Enclosure

cc: Jack Yarbrough
Frank J. Carey
George Psaras
Edward Lienhard
Teresa Hynes
William J. Nellis, Esquire
Gerald A. Goldberg, Esquire

APPENDIX 2

Defendants' Exhibit 14

Tender and Interest
RE: Fred E. Howell

(logo)
KRAFT
INC

Dairy Group

May 20, 1981

Ms. Doris Annetti
Analyst Team Leader
Pension Processing Department
Central States, Southeast and Southwest Areas
Health and Welfare and Pension Funds
P. O. Box 145
Des Plaines, Illinois 60017

Re: Howell, Fred E.
Application for Twenty-Year Service Pension Benefit
S. S. # 411-20-7083

Dear Ms. Annetti:

In response to your letter concerning pension contributions on behalf of the above referenced former employee, enclosed please find our check in the amount of $848.00 which represents the total premiums owed during the period September 27, 1970, through December 30, 1972. Please acknowledge receipt of this amount and the satisfaction of our obligation for contributions on behalf of Fred E. Howell.

Very truly yours,

/s/ L. M. Cochran, Jr.
District Controller

P. O. Box 1128, Nashville, TN 37202, (615) 329-1234

BEST AVAILABLE COPY

Kraft INC

SEE REVERSE FOR ADDRESS

AIRY GROUP U S *** 02 DATE 05/28/81

CHECK NUMBER 1480153

PY DATE	INVOICE REFERENCE AND AMOUNT		DISCOUNT	NET	
28/81	054795 05/26/81	848.00	0.00	848.00	1493 05
NTRAL	STATES ACT 7000	848.00	0.00	848.00	

19-2
1250

AIRY GROUP U S *** Kraft INC

439064

E ISSUED TO THE ORDER OF

/28/81 CENTRAL STATES ACT 7000 02 2315173

PEN 7177000-1204
AMER NATL BK PO B 1431
CHICAGO IL 60690

CHECK NUMBER
1480153

PAY AMOUNT
$ 848.00**********

EXACTLY $*********848DOLLARS00CENTS

VOID OVER $25,000
UNLESS COUNTERSIGNED

W. B Jordan

.TTLE-FIRST NATIONAL BANK

"0043906 4" 1:1250000 24 1: 13996 806"

(logo)
CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND PENSION FUNDS

Employee Trustees
Loran W. Robbins
Marion M. Winstead
Harold J. Yates
Earl L. Jennings, Jr.

Employer Trustees
Howard McDougall
Robert J. Baker
Thomas F. O'Malley
R. V. Pulliam, Sr.

August 26, 1981

SEALTEST FOODS
1401 Church Street
Nashville, Tennessee 37203

RE: PENSION BENEFITS
MR. FRED E. HOWELL
SOCIAL SECURITY No.: 441-20-7083
ACCOUNT NO.: 7177000-1204

Gentlemen:

In reference to the above, Mr. Howell is currently applying for Pension Benefits. We have found that interest has not been submitted on Mr. Howell's behalf for the period of May, 1971 through May, 1981.

Mr. Howell is entitled to Pension Credit for this period and your account is being debited for $1,293.86 as detailed below:

FROM	TO	NUMBER OF WEEKS	CONTRACT RATE	AMOUNT
09/27/70	12/26/70	13	@ $6.00	$ 78.00
12/27/70	05/29/71	22	@ $6.00	132.00
05/30/71	11/27/71	26	@ $7.00	182.00
11/28/71	12/25/71	4	@ $8.00	32.00
12/26/71	12/30/72	53	@ $8.00	424.00
			CONTRIBUTIONS	$ 848.00
			INTEREST	445.86
			TOTAL BALANCE DUE	$1,293.86

Please remit full payment of interest in the total amount of $445.86 by September 1, 1981 to the attention of the undersigned. You check for contributions owed in the amount of $848.00 has already been received June 4, 1981. If you have any questions regarding this matter, please call me at (800) 323-2152. Extension 483.

8550 W Bryn Mawr Avenue (312) 693-5300

Chicago, Illinois 60631

SEALTEST FOODS
August 26, 1981
Page Two

Very truly yours,

/s/ Jeffrey J. Jensen
Employer Auditor
Delinquent Account/In-House Employer Audit

JJJ :lam

cc: Mr. Mary Balint, Director, Pension Benefits
Mr. Frank J. Carey, Counsel
Mr. George Psaras, Director, Operations Accounting
Mr. Joseph J. Burke, Assistant Counsel
Ms. Teresa E. Whisson, Manager, Delinquent Account/In-House Employer Audit
Local Union No.: 327, Mr. Dempsey Newell, President
Cecil D. Branstetter, Esquire

PART 1—CHARGES ACCEPTED SINCE THE 07-29-81 BILLING

PREPARED 08/27/81
SEALTEST FOODS
ACCOUNT NO. 7177000-1204

EMPLOYER	TERM	REASON	BEGINNING DATE	HEALTH & WELFARE ADJUSTMENT AMOUNT	PENSION ADJUSTMENT AMOUNT
7177000	1204	DEBIT MEMO	08-25-81	$	$ 848.00
7177000	1204	MANUAL INTEREST	08-25-81	$	$ 445.86
				$ 0.00	$ 1,293.86

PREVIOUS PERIOD ADJUSTMENTS FOR EMPLOYER 7177000

APPENDIX 3

Pension Plan Trust Agreement Provisions

ARTICLE III

§ 1 & § 5

TRUST AGREEMENT
CREATING THE

CENTRAL STATES,
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND

With all amendments
incorporated as of
January 22, 1970

ARTICLE III

CONTRIBUTIONS AND COLLECTIONS

Section 1. Amount of Contributions—Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable Collective Bargaining Agreement between the parties. The obligation to make such contributions shall continue during periods when the Collective Bargaining Agreement is being negotiated, but such contributions shall not be required in cases of strike after contract termination, unless the parties mutually agree otherwise.

. . .

Section 5. Production of Records—Each Employer shall promptly furnish to the Trustees, on demand, the names of its employees, their Social Security numbers, the hours worked by each employee and such other information as the Trustees may reasonably require in connection with the Administration of the Trust. The Trustees may, by their representatives examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust. All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether (a) the company is a corporation and the names of all of its officers; (b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor. The Union will comply with any reasonable request of the Trustees to examine those records of the Union which may indicate the employment record of any employee whose status is in dispute.

APPENDIX 4

Relevant Provisions of the LMRA and ERISA

I. LABOR-MANAGEMENT RELATIONS ACT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the

United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

§ 1132 Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

. . . .

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

. . . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph [2]) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

. . . .

§ 1145 Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.